OCT 18 1995

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Supreme Court, U.S.
FILED
SEP 28 1995
OFFICE OF THE CLERK

No. 95-357

In The

Supreme Court of the United States

October Term, 1995

PAMELA HOUSTON,

Petitioner,

v.

ALL SAINTS HEALTH SYSTEM, INC., JENNY McNEIL, and DR. KENNETH PEARCE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ALL SAINTS HEALTH SYSTEM AND JENNY McNEIL

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41 pp

QUESTIONS PRESENTED

1. Whether Plaintiff's contention that All Saints Health System ("All Saints") is liable under Title VII of the Civil Rights Act of 1964 for the conduct of a non-employee staff physician properly is before this Court on a Petition for Writ of Certiorari since both the District Court and the Circuit Court of Appeals expressly found that they did not need to reach that issue in rendering their decisions?

2. If such issue properly is before this Court, is a hospital liable under Title VII for the allegedly harassing conduct of a non-employee staff physician directed toward a nurse employed by the hospital?

3. Whether All Saints took prompt remedial action in response to Petitioner's complaint of harassment, and thus absolved itself of liability under Title VII, when Petitioner's supervisor, immediately upon becoming informed of allegedly harassing conduct by a staff physician, verbally reprimanded said physician and the physician thereafter no longer engaged in said conduct?

4. Whether summary judgment is an appropriate procedural vehicle for dismissing claims under Title VII where the plaintiff fails to raise any material issue of fact that she suffered sex discrimination under Title VII?

5. Whether a staff physician, who is neither an agent nor an employee of a hospital, may be held personally liable under Title VII?

QUESTIONS PRESENTED – Continued

6. Whether the decision of the Fifth Circuit herein creates a conflict among the Circuit Courts of Appeals subject to review on the question of whether agents or supervisors may be held directly liable under Title VII?

PARTIES TO THE PROCEEDING

Respondents, All Saints Health System, Jenny McNeil, and Dr. Kenneth Pearce and Petitioner, Pamela Houston. All Saints Health System has no parent company or subsidiaries other than one wholly-owned subsidiary.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ALL SAINTS HEALTH SYSTEM AND JENNY McNEIL

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, provides that it is unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals's race, color, religion, sex, or national origin; or

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Courts Below.

Petitioner, Pamela Sue Houston (hereafter "Houston"), filed suit on August 20, 1993 in Texas state court against EBI Companies (later dismissed by agreement), All Saints Health Care, Inc. d/b/a All Saints Hospital ("All Saints" and/or the "Hospital"),[1] Jenny McNeil ("McNeil") and Dr. Kenneth Pearce, M.D. ("Dr. Pearce"),[2] alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"); 42 U.S.C. § 1981; the Texas Workers' Compensation Act, Tex. Rev. Civ. Stat. Ann. Art. 8307c; the Texas Constitution; and various common law torts. (Vol. I at 7-22.)[3]

On October 8, 1993, Respondents All Saints and McNeil filed a Notice of Removal to the United States

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[1] This Respondent now is identified by Houston as All Saints Health System, Inc. However, the correct name is All Saints Health System. (Vol. VII at 1453 (no. 1)).

[2] All Saints and McNeil had joint counsel. Dr. Pearce was, and is, represented by separate counsel.

[3] Citations to the original record on appeal shall first refer to the volume, and then to the page or pages, and where appropriate, lines or paragraphs, in that volume.

District Court for the Northern District of Texas pursuant to 28 U.S.C. § 1331. (Vol. I at 1-6.) On April 19, 1994, Houston filed her Second Amended Complaint, which pled out EBI Companies as a party and alleged unlawful employment practices, including racial and sexual harassment, race discrimination, and retaliatory discharge by the remaining defendants. (Vol. I at 189-203.) All Saints and McNeil filed amended answers asserting that Dr. Pearce was not an agent of All Saints and that Houston failed to exhaust her administrative remedies, as well as numerous other defenses. (Vol. IV at 889-99.)

On August 31, 1994, All Saints and McNeil filed their Motion for Partial Summary Judgment and Brief in Support Thereof (Vol. III at 436-684), as well as McNeil's Motion to Dismiss (Vol. II at 432-35).[4] Also, on August 31, 1994, Dr. Pearce filed his Motion for Summary Judgment and supporting Brief. (Vol. IV at 694-880.)

On September 29, 1994, the District Court entered an order granting All Saints' and McNeil's Motion for Partial Summary Judgment to the extent that Houston, through a Pretrial Order signed on September 28, 1994, had abandoned certain claims addressed in said Motion. (Vol. VI at 1320; Vol. VII at 1481-82; Vol. VIII at 5.)

On October 7, 1994, the District Court issued its Memorandum Opinion and Order granting All Saints' and McNeil's Motion for Partial Summary Judgment (Vol. VII at 1480-88), and entered a final judgment dismissing

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[4] McNeil's Motion to Dismiss the Title VII claims against her was granted by the District Court's Order of September 21, 1994 (attached hereto as Appendix 1). This Order has *not* been appealed by Houston, and therefore there is no issue before the Court as to whether McNeil is individually liable under Title VII.

the remainder of Houston's claims (Vol. VII at 1499).[5] Houston filed her Notice of the Appeal to the Fifth Circuit on October 21, 1994. (Vol. VII at 1490-91, 1506-07.) On April 21, 1995, the Fifth Circuit, without oral argument, issued an unpublished opinion upholding the District Court's summary judgment order. (*See* Appendix A to Petition for Writ of Certiorari.)

B. Statement of Facts.[6]

Houston was employed by All Saints from April, 1984 to August 21, 1991 as a registered nurse in the surgery department's Holding Room, where patients were brought prior to being taken into the operating room or "surgical suites." (Vol. III at 455; *see also* Vol. I at 190-92.) Dr. Kenneth Pearce was an anesthesiologist and an officer of Anesthesia Care, Inc. ("ACI"), a company which contracted with All Saints to provide anesthesia services to the Hospital's patients. As such, Dr. Pearce had physician staff privileges at the Hospital but was not an employee thereof. As a Holding Room nurse, Houston worked on occasion with Dr. Pearce, although Dr. Pearce was not her employer or supervisor. (Vol. III at 450-51, 455; Vol. VI at 1260-61; Vol. VII at 1453 (no. 1), 1454 (nos. 4 and 5), 1466 (nos. 85-93), 1468 nos. (104-09), 1469 (nos. 110-15).) From approximately April, 1990 to August 21, 1991, Houston's supervisor was Jenny McNeil, Surgical

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[5] The only claims addressed in Houston's Petition for Certiorari are the discrimination and harassment claims under Title VII. None of her other claims, including those of retaliation under Title VII and the Texas Workers' Compensation Act, have been preserved for appeal.

[6] All Saints notes that Houston has not cited to the record for any of the supposed facts in her statement of such, at pp. 7-10 of her Petition.

Nurse Supervisor. (Vol. III at 455; Vol. VI at 1260-61; Vol. VII at 1469 (no. 110).)

In or around July of 1991, Houston complained to McNeil that Dr. Pearce had made a comment to her which she found racially offensive. (Vol. III at 458; Vol. VII at 1454 (no. 7).)[7] McNeil assured Houston that she would address the complaint. Thereafter, McNeil immediately reported this incident to the then Director of Surgical Services, Geraldine Petersen, who confirmed that McNeil's proposed course of action – counseling Dr. Pearce to cease making any racial remarks – was appropriate. (Vol. III at 458; Vol. VII at 1454 (no. 7), 1455 (no. 8), 1463 (no. 65).) Thus, McNeil immediately met with Dr. Pearce regarding the incident, stating that racially offensive language would not be tolerated and telling him to cease any such conduct. Dr. Pearce agreed to refrain from using such language. *Id.*

After leaving the meeting, McNeil talked to Houston and informed her of the conversation with Dr. Pearce, including that she had told Dr. Pearce to cease making racially offensive comments. *Id.* It is undisputed that McNeil received *no* other complaints from Houston, nor anyone else, about Dr. Pearce after that time. (Vol. III at 459; Vol. VII at 1455 (no. 9).) In fact, Houston's single complaint about Dr. Pearce was the *only* time that anyone ever had complained to McNeil about Dr. Pearce making racially offensive comments. (Vol. III at 458-59; Vol. VII at 1460 (no. 40).) Houston admitted that, following this reprimand, Dr. Pearce's conduct towards her improved, and he did not make any further racial comments to her. (Vol. III at 563; Vol. VII at 1461 (no. 48).)

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[7] Houston has admitted that she complained *only* about *racially* offensive comments, and made no mention of any sexually offensive comments or behavior. (Vol. III at 553:4-9; *see also* Vol. III at 459.)

On or about August 21, 1991, Houston allegedly injured her back while pushing an occupied stretcher into the operating room. This was the last day Houston ever reported for work at All Saints. (Vol. I at 192-93, ¶13.) Houston filed a workers' compensation claim for her alleged injury shortly after the incident. (Vol. I at 193, ¶14.) On October 15, 1991, Houston filed a charge with the Equal Employment Opportunity Commission ("EEOC") and the deferral agency, the Fort Worth Human Rights Commission ("FWHRC"), alleging that she had been harassed and discriminated against on the basis of her *race* as follows:

(1) receiving a "low" merit raise on April 15, 1991;

(2) being required to transport patients to their surgical rooms; and

(3) harassment by Dr. Pearce with no response by McNeil to Houston's complaint of such.

(Vol. III at 578-79.)

On June 18, 1992, the Hospital wrote to Houston informing her that, as she had reached maximum medical improvement on June 1, 1992 (according to the Texas Workers' Compensation Commission), and had not returned to work, she was being placed on "nonactive status" or a "leave of absence." The letter noted that, under such status, Houston could continue her benefits and apply for any other available position which she could perform.[8]

However, as noted in the letter, pursuant to Hospital policy, Houston could remain on leave only for one year,

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[8] Prior to this letter, Houston actually was offered another job position, at her pre-injury rate of pay. She was informed that the Hospital would accommodate her doctor and therapy appointments and would work to modify her job duties as necessary. (Vol. III at 651-54; Vol. V at 1064-66.)

after which time she would be removed from the employment rolls. (Vol. III at 598-99, 601.)

By letter of June 11, 1993, the Hospital notified Houston that her leave of absence had expired and, pursuant to Hospital policy, All Saints was removing her from the active employee roster. This letter noted that Houston had not applied for any other job at All Saints during her leave, but that she would be eligible for rehire should she choose to apply for another position in the future. (Vol. III at 598-99, 602.) Thus, Houston was taken off the Hospital's roster in June of 1993 due solely to the expiration of Houston's leave under All Saints' absence control policy.

SUMMARY OF REASONS FOR DENYING THE WRIT

Houston's Petition for Writ of Certiorari cannot survive even cursory scrutiny. Generally, where a petitioner seeks review of a Court of Appeals decision on a writ of certiorari, the Court will take into account the following considerations:

1) Whether the decision below conflicts with the decision of another Court of Appeals on the same matter, conflicts with a state court of last resort, or "has so far departed from the accepted and usual course of proceedings . . . as to call for an exercise of this Court's power of supervision"; or
2) Whether the lower court "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court."

Sup. Ct. R. 10.1(a) and (c). The Fifth Circuit decision addressed herein implicates none of these considerations.

First, Houston devotes a substantial portion of her Petition to an issue that was *never reached* by the lower

courts, namely, whether All Saints is liable for the alleged conduct of Dr. Pearce. Both the District Court and the Fifth Circuit determined that they need not reach this issue because of their holding that All Saints promptly had remedied Houston's single complaint of harassment. Since such prompt remedial action absolved All Saints both of direct liability under Title VII, as well as indirect liability if Dr. Pearce were found to be an agent of All Saints, the question of whether Dr. Pearce actually was All Saints' agent or employee was superfluous. Thus, Houston improperly attacks a ruling that neither was made, nor needed to be made, by the courts below.[9]

Second, Houston argues that All Saints did not engage in prompt remedial action. This is the central issue addressed by the courts below, and both the District Court and the Fifth Circuit correctly held that the uncontroverted evidence, most notably Houston's *own admissions*, unequivocally demonstrates that McNeil took *immediate* action following Houston's complaint of harassment. Moreover, following McNeil's reprimand of Dr. Pearce, his behavior improved, and All Saints received no further complaints (from Houston or anyone else) of harassment by Dr. Pearce. Houston apparently urges a requirement that an employer take "severe retributive action" as opposed to "prompt remedial action," but there simply is not a shred of authority to support such a request.

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[9] However, as noted by the District Court below, even if the issue of All Saints' liability for Dr. Pearce's alleged conduct were to be examined, there is no evidence that Dr. Pearce acted as an agent of All Saints, and there is no probative evidence that All Saints knew or should have known of any alleged conduct by Dr. Pearce, other than Houston's lone complaint in 1991, which was resolved promptly. Petitioner's Appendix B at 22a n.7.

Third, Houston attempts to revive her sex discrimination claim *not* by challenging the Fifth Circuit's ruling that Houston failed to raise *any* evidence that McNeil's decision to require her to push stretchers was motivated by sex discrimination, but rather by arguing as a general proposition that summary judgment is not an appropriate means of resolving Title VII cases. This nonsensical argument is completely at odds with decisions from *every* Circuit Court of Appeals, and, if it were to become law, essentially would guarantee that each and every Title VII plaintiff is entitled to a full civil trial, without regard to whether they can raise a genuine issue of material fact to support their claims. This result flies in the face of universal precedent among the federal courts.

Finally, Houston's argument that there is a split among the Circuits on the issue of whether supervisors or agents are individually liable under Title VII is entirely unconvincing. Houston essentially argues that, although the Fifth Circuit has held, both in the decision below and in other cases, that a supervisor or agent can be held individually liable under Title VII (the result which Houston urges), a decision out of the *Ninth* Circuit has held the opposite, thus creating a split among the Circuits. Why this requires review by this Court is a mystery. The ruling with which Houston takes issue is that of a different circuit in an entirely unrelated case. Houston does *nothing* to challenge the rationale expressed by the Fifth Circuit herein that in order to find an individual liable under agency principles, a plaintiff must demonstrate that the individual was the employer's agent with respect to employment practices. This analysis is neither mentioned nor briefed by Houston, and therefore is not properly before this Court.[10]

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[10] Nor does Houston challenge the Fifth Circuit's ruling that no employment relationship existed between All Saints and Dr. Pearce.

REASONS FOR DENYING THE WRIT

I. THE QUESTION OF WHETHER ALL SAINTS IS LIABLE FOR THE CONDUCT OF DR. PEARCE IS NOT PROPERLY BEFORE THE COURT, AS NEITHER COURT BELOW RULED ON THIS ISSUE

A substantial portion of Houston's Petition is devoted to the argument that "the courts below failed to apply agency principles and held that the hospital could not be responsible for the conduct of Dr. Pearce since he was not an employee of the hospital." Petition at 13-14. Houston argues that such a ruling is erroneous and conflicts with this Court's decision in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986).

Houston's argument fails for an elementary reason: neither court below ever made such a ruling. Rather, the Fifth Circuit held that because "All Saints took prompt remedial action in response to Houston's complaint, *we need not, and therefore do not, address the preliminary issue whether All Saints is even subject to liability for Dr. Pearce's actions through any employer-employee or principal-agent relationship.*" Petitioner's Appendix A at 6a n.11 (emphasis added).[11] Thus, the Fifth Circuit held that the issue of the Hospital's liability for the conduct of a staff physician was immaterial in the instant case, as the prompt remedial action by All Saints, discussed *infra*,

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[11] As discussed *infra*, the Fifth Circuit did address the relationship between All Saints and Dr. Pearce for the purpose of determining *Dr. Pearce's* liability, if any. Petitioner's Appendix A at 6a-9a. However, with respect to All Saints' liability as an employer, which is discussed in Section I (pp. 13-16) of the Petition and is the issue mentioned in *Meritor*, the Fifth Circuit held that it need not reach the nature of the relationship between All Saints and Dr. Pearce.

absolved the Hospital of liability both for its own actions as well as those of its agents or supervisors.

This closely follows the rationale of the District Court, wherein the judge concluded:

> In determining whether All Saints is indeed liable for Pearce's conduct, assuming plaintiff's allegations are true, the court need not reach the point of examining the legal relationship between them. That step is not necessary, because the summary judgment evidence shows that, whether or not Pearce was its employee, immediately after plaintiff complained of Pearce's conduct, All Saints reprimanded Pearce. Plaintiff did not thereafter make any complaint regarding Pearce's conduct and, in fact, admitted that his conduct toward her changed.

Petitioner's Appendix B at 22a-23a.[12]

Consequently, this question, which forms the cornerstone of Houston's Petition, is not properly before the Court. As this Court observed in *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 90 S. Ct. 1598 (1970), "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." 398 U.S. at 147 n.2, 90 S. Ct. at 1603 n.2 (citing, *inter alia*, *Lawn v. United States*, 355 U.S. 339, 362-63, 78 S. Ct. 311, 324-25 (1958)). *See also Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 2877 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed on below").

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[12] The District Court did state in *dicta*, however, that "[i]f such an examination was required, the court would find that there is insufficient summary judgment evidence adduced by plaintiff to create a fact issue as to an employer/employee relationship between All Saints and Pearce." Petitioner's Appendix B at 22a n.7.

II. EVEN IF ALL SAINTS' POTENTIAL LIABILITY FOR DR. PEARCE'S ALLEGED CONDUCT PROPERLY WERE BEFORE THIS COURT, THERE IS NO EVIDENCE TO SUPPORT PLAINTIFF'S CLAIM THAT DR. PEARCE WAS AN AGENT OF THE HOSPITAL

Even if All Saints' potential liability for Dr. Pearce's conduct properly were before this Court, which it is not, Houston's argument that Dr. Pearce was an agent of All Saints cannot withstand scrutiny.[13] Essentially, Houston argues in her Petition that "[t]he hospital placed Dr. Pearce in a position of authority which enabled him to engage in racial and sexual misconduct in the workplace and the hospital should be responsible for his unlawful harassment." Petition at 15. The only authority cited by Houston to support this proposition is *Meritor*, which Houston contends mandates the full application of common-law agency principles in the context of Title VII.

Houston's analysis simply misses the mark. First, her reliance on *Meritor* is misplaced. *Meritor* neither addressed nor contemplated the potential liability of an employer for conduct committed by *non*-employees.

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[13] Houston no longer argues that Dr. Pearce was a supervisory employee of All Saints, which she maintained before both courts below. Thus, the issue before the Court is narrowed to whether Pearce was an agent of All Saints. Further, Houston raises for the *first* time in her Petition the argument that, even if Pearce was not an agent of the hospital, All Saints is liable for his conduct as a non-employee, under the standards set forth in the Equal Employment Opportunity Commission ("EEOC") Guidelines. Petition at 14. This issue was *never* raised before the Fifth Circuit, and therefore cannot serve as a basis for granting a writ of certiorari. *See Berkemer v. McCarty*, 468 U.S. 420, 443, 104 S. Ct. 3138, 3152 (1984).

Rather, the Court in *Meritor* was faced with a circumstance in which the alleged harasser was the vice president and branch manager of the defendant corporation. *Meritor*, 477 U.S. at 59, 106 S. Ct. at 2401-02. Moreover, *Meritor* applied agency principles as a means of *limiting* an employer's liability, not expanding it. As the Court observed:

> Congress' decision to define "employer" to include any "agent" of an employer . . . surely evinces an *intent to place some limits* on the acts of employees for which employers under Title VII are to be held responsible.

Id. at 72, 106 S. Ct. at 2408 (emphasis added, citation omitted).[14]

Thus, the *Meritor* Court rejected the notion that employers automatically are liable for the conduct of all their supervisory employees. *Id.* Clearly, Houston's attempt to utilize agency principles as a means of *expanding* employer liability under Title VII is a corruption of the principles laid down in *Meritor*.

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[14] Nor did the *Meritor* Court "decide," as alleged by Houston, that "the question is not whether the supervisor or agent has been delegated employment decisions . . . but whether they have authority or the appearance of authority in the workplace." Petition at 14-15. This reasoning nowhere is included in the majority opinion. Rather, Houston relies upon her own misreading of the *concurring* opinion by Justice Marshall, in which he opined that where a supervisor has authority "vested" in him by the employer, the employer should be liable for the supervisor's conduct regardless of whether the employer had actual notice of such conduct. *Meritor*, 477 U.S. at 76-77, 106 S. Ct. 2410 (Marshall, J., concurring). This issue has nothing to do with the case at hand. Nor did Justice Marshall address the question of "actual" versus "apparent" authority. Thus, there is nothing in the language of the *Meritor* decision itself to support Houston's mischaracterization of it.

Moreover, the Court in *Meritor* expressly recognized that agency principles "may not be transferable in all their particulars to Title VII." *Id.* Subsequent to *Meritor*, each federal court that has addressed the agency question has held that "an agent under Title VII and the ADEA must be an agent with respect to employment practices."[15] Thus, in accordance with the language in *Meritor*, the lower federal courts have applied agency principles only where the authority delegated to the employee includes authority relating to employment decisions.

In the instant case, the uncontroverted summary judgment evidence conclusively demonstrates that All Saints vested Dr. Pearce with *no* authority relating in any manner to employment practices. Indeed, Houston admitted in her deposition that she had no idea what Dr. Pearce's relationship with the Hospital was, and she merely speculated that Dr. Pearce *either* was an employee *or* "had some type of contract with All Saints in order to be there." (Vol. III at 556.) Houston does not know who paid Dr. Pearce for his anesthesiology services, who billed his patients, or whether he received any monies or benefits from All Saints. (Vol. III at 498-500.) The summary judgment evidence reveals, however, that All Saints did not perform those activities for Dr. Pearce. (Vol. III at 451.) Finally, Houston admits that she never was informed that Dr. Pearce was an employee or agent of All Saints. (Vol. III at 556-57.)

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[15] *Deal v. State Farm County Mut. Ins. Co.*, 5 F.3d 117, 119 (5th Cir. 1993) (citing *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360, 362 (6th Cir. 1982)); *Fike v. Gold Kist, Inc.*, 514 F.Supp. 722 (N.D.Ala. 1981), *aff'd* 664 F.2d 295 (11th Cir. 1981); *Konieczny v. Derickson*, 43 Fair Emp. Prac. Cas. (BNA) 251 (S.D.Ill. 1987). Tellingly, Houston neither cites the *Deal* decision, nor raises *any* argument that these decisions conflict in any manner with this Court's ruling in *Meritor*.

Indeed Houston's *only* "evidence" supporting her spurious argument is her own affidavit testimony, submitted *subsequent* to her deposition, to the effect that Dr. Pearce was "in charge" of the surgery department and "controlled" the surgical nurses. (Houston's Brief to the Fifth Circuit at 19, citing Vol. V at 981.)[16] However, Houston's obvious afterthoughts provided in the form of her belated affidavit cannot support a finding that Dr. Pearce was an agent of All Saints. First, Houston's attempt to *avoid* her prior testimony through a subsequent, and fundamentally inconsistent, affidavit does *not* raise a material issue of fact.[17] Consequently, Houston's affidavit testimony should *not* be considered by this Court.

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[16] Houston argues, without citation, that nurses sometimes were given orders by Dr. Pearce when they worked in the surgery department, and that she was told that he could have her fired. Petition at 7. The only possible source for these allegations is this same affidavit. (Vol. V at 981.) However, Houston admitted in her deposition, prior to her affidavit, that Dr. Pearce did *not* supervise her or the other nurses, did *not* order her around, did *not* evaluate her performance, did *not* set the schedules for the nurses, and could *not* fire her. (Vol. VI at 1219, 1221, 1231-33, 1260-63). Furthermore, on Houston's last day of deposition, she stated that she had reviewed this portion of her deposition and had no changes. (Vol. VI at 1272.)

[17] *See, e.g., Thurman v. Sears, Roebuck & Co.*, 952 F.2d 128, 136 n.23 (5th Cir. 1992); *Bank Leumi Le-Israel B.M. v. Lee*, 928 F.2d 232, 236-37 (7th Cir. 1992); *Van T. Junkins & Assoc., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11th Cir. 1984) (non-movant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony).

Second, even if such affidavit is considered, it is completely undercut by Houston's own admissions and stipulations. Thus, the Fifth Circuit observed:

> Houston claims that her testimony to the effect that Dr. Pearce "took charge" of the surgery department, that the nurses obeyed his orders, and that she believed that Dr. Pearce could have her fired, is sufficient to present a genuine issue as to a material fact. We disagree with Houston's assertion. There is a *total absence* of any evidence in the record that Dr. Pearce had *any* input regarding Houston's employment conditions. The parties stipulated that Houston's direct supervisor was Ellen Baldwin, who reported to McNeil, and that Dr. Pearce did not set Houston's schedule, did not evaluate Houston's job performance, and did not have the authority to discharge any All Saints employee.

Petitioner's Appendix A at 7a-8a. In sum, not only is there no evidence in the record to support Houston's assertion that Dr. Pearce was an agent of the Hospital (other than her own speculative testimony), *all* of the competent evidence in the record clearly establishes that Dr. Pearce was *not* an agent of the Hospital with respect to Houston's employment conditions. Thus, the Fifth Circuit's decision in this regard is correct and does not merit a writ of certiorari.[18]

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[18] Houston curiously adds at the end of her argument regarding agency principles a discussion of hostile environment sex harassment under *Harris v. Forklift Systems, Inc.*, 510 U.S. ___, 114 S. Ct. 367 (1993), arguing that the "district court and the court of appeals did not look at all the circumstances [concerning alleged sex and race harassment] but only the one incident about which Petitioner complained to McNeil." Petition at 15. Once again, Houston simply misperceives the issues properly

III. THE FIFTH CIRCUIT CORRECTLY RULED THAT ALL SAINTS AND MCNEIL ARE NOT LIABLE FOR HARASSMENT UNDER TITLE VII BECAUSE THEY TOOK PROMPT REMEDIAL ACTION IN RESPONSE TO HOUSTON'S COMPLAINT

The Fifth Circuit recently has held that "when a company, once informed of allegations of sexual harassment, takes prompt remedial action to protect the claimant, the company may avoid Title VII liability." *Nash v. Electrospace Sys.*, 9 F.3d 401, 404 (5th Cir. 1993). This decision echoes the language of the EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(d) and (e).[19] Indeed, Houston makes *no* contention in her Petition that this is *not* the rule universally applied in federal

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before the Court, and misstates the lower court decisions. Neither the District Court nor the Fifth Circuit ever addressed whether Houston was, in fact, harassed, as each court found that regardless of the nature of Dr. Pearce's conduct, All Saints took immediate and effective remedial action. Importantly, this ruling rendered several arguments by *all* parties moot. For example, despite significant evidence that Houston's claims of sex discrimination and sex harassment were barred under Title VII because Houston failed to file an EEOC charge with respect to such allegations, the Fifth Circuit did not rule on that issue. *See Ray v. Freeman*, 626 F.2d 439, 442-43 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981). Rather, the court held: "As we have found no genuine issue of material fact supporting the merits of Houston's claims, however, we need not, and do not, address these procedural issues." Petitioner's Appendix A at 9a, n.21.

[19] Cited favorably by Justice Marshall in his concurring opinion in *Meritor*, 477 U.S. at 74, 106 S. Ct. at 2409, which concurrence frequently is relied upon by Houston herein as authoritative.

courts. In the case at bar, the Fifth Circuit ruled that All Saints and McNeil took such remedial action:

> After Houston informed McNeil of Dr. Pearce's offensive behavior, McNeil assured Houston that she would address the matter and *immediately* reported the complaint to [Geraldine] Peterson, the Director of Surgical Services, who told McNeil that her planned reprimand of Dr. Pearce was the appropriate course of action. McNeil *wasted no time* in meeting with Dr. Pearce, telling him that racially offensive language would not be tolerated, and counseling him to cease making racist comments to Houston. After the meeting, Houston was promptly informed by McNeil of just how she had dealt with Houston's complaint. Houston admitted in her deposition that after McNeil's meeting with Dr. Pearce, his behavior "toned down a lot" and that Dr. Pearce made no further racially offensive comments to her.

Petitioner's Appendix A at 5a (emphasis added). Houston now contends in her Petition that this holding is in error for two reasons, both of which must fail.[20]

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[20] An additional argument raised by Houston before the Fifth Circuit, but not herein, was that McNeil's reprimand did not constitute remedial action because McNeil was not a member of the administrative staff of the hospital. Houston's Brief to the Fifth Circuit at 16. The Fifth Circuit unceremoniously disposed of this argument:

> We disagree, particularly in light of the effectiveness of McNeil's reprimand. McNeil's talk with Dr. Pearce, which occurred shortly after McNeil received Houston's complaint, succeeded in putting an immediate and permanent stop to Dr. Pearce's offensive comments aimed at Houston. McNeil's technical authority in relation to Dr. Pearce is, therefore, irrelevant . . . .

Petitioner's Appendix A at 5a-6a.

First, Houston argues that the remedial action "was not prompt or immediate since [Dr. Pearce] had been engaging in sexual and racial harassment for years." Petition at 20. To support this claim, Houston alleges, without any citation to the record, that "McNeil and nurse director Petersen had been aware of Dr. Pearce's conduct for years." Petition at 19. This statement simply is false. First, Houston *stipulated* at the District Court level that she *never* complained about *sexually* harassing conduct to *anyone* at All Saints. (Vol. III at 459 (no. 8), 548-49, 553; Vol. VII at 1455 (no. 10).) Further Houston *admitted* that her supervisors would have had no reason to know she was offended by Dr. Pearce's comments prior to her July, 1991 complaint to McNeil. (Vol. III at 550-51.) Thus, Houston's contention in her Petition is undercut by all of the evidence in the record, including her own unambiguous admissions.

Second, Houston argues that the remedial action "was not effective because [Dr. Pearce's] conduct continued." Petition at 20. Once again, Houston points to nothing in the record to support her claim, and indeed she cannot, as her own admissions completely contradict her current representations to this Court. Houston *admits* that Pearce made *no further* racially offensive comments to her after being reprimanded by McNeil. (Vol. III at 563.) Houston also testified that after the reprimand, Pearce "was quiet. He had toned down a lot." *Id.* Houston further admits that she has *no opinion* about whether the action taken by McNeil was satisfactory. (Vol. III at 561-62.) Finally, after this isolated complaint, Houston *never again complained* to All Saints or McNeil, or put them on notice in any manner, that any harassing conduct allegedly was continuing. (Vol. III at 459, 564.)[21] In

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[21] Indeed, Houston stipulated in the Joint Pretrial Order: "After July, 1991, neither Dr. Pearce nor anyone else connected

essence, as the Fifth Circuit found, Dr. Pearce's alleged conduct was put to "an immediate and permanent stop." Petitioner's Appendix A at 6a. Thus, as Dr. Pearce's behavior improved and Houston no longer complained, All Saints had no reason to believe that its remedial efforts were anything less than effective, as indeed those measures had solved the problem.

Houston makes vague reference in her Petition to *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C.Cir. 1981) for the proposition that "an employer should promptly take all necessary steps to investigate and correct any harassment, including warnings and appropriate discipline directed at the offending party." Petition at 20.[22] However, Houston does not explain what additional steps she believes the Hospital should have taken. In *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989), the Fifth Circuit held that "[w]hat is appropriate remedial action will necessarily depend on the *particular facts* of the case – the severity and persistence of the harassment, and the effectiveness of any initial remedial steps." *Id.* at 479 (emphasis added). Thus, where, as here, initial remedial steps *are* effective, no additional steps should be required.

Clearly, "Title VII does not require that an employer use the most serious sanction available to punish an offender." *Landsgraf v. USI Film Prods.*, 968 F.2d 427, 430 (5th Cir. 1992), *aff'd in part*, 114 S. Ct. 1483 (1994). Rather, as the Fifth Circuit held below, "the effectiveness of any

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with All Saints made any racial or sexual comments, or engaged in any sexual or racial conduct, towards Plaintiff in connection with her work at the Hospital." (Vol. VII at 1461 (no. 48).)

[22] This reliance is misplaced. In *Bundy*, as opposed to the instant case, the court found that the employer "had full notice of harassment committed by agency supervisors and did *virtually nothing* to stop or even investigate the practice." 641 F.2d at 943 (emphasis added).

initial remedial steps taken by the employer is an important factor in assessing what constitutes appropriate remedial action." Petitioner's Appendix A at 5a (citing *Waltman*, 875 F.2d at 479). Thus, the Fifth Circuit's ruling that the verbal reprimand constitutes prompt remedial action because Dr. Pearce ceased his allegedly harassing conduct immediately thereafter, is consistent with the relevant case law and need not be reviewed on certiorari.

IV. THE COURTS BELOW PROPERLY DISPOSED OF PLAINTIFF'S CLAIM OF RACE DISCRIMINATION ON SUMMARY JUDGMENT

Houston's Petition also focuses on her allegation that All Saints and McNeil discriminated against her on the basis of her race (African American) by "chang[ing] Petitioner's job duties by ordering her to transport all surgery patients from the holding room into the operating rooms without assistance from the orderlies or other nurses." Petition at 9. Essentially, Houston alleges that pushing stretchers was a job function previously performed by white male orderlies, and that by being required to push stretchers, she was unable to adequately perform her other job duties. *Id.*

The Fifth Circuit, however, held that "the summary judgment evidence does not reveal that discrimination had anything to do with McNeil's actions in requesting Houston to push patient stretchers." Petitioner's Appendix A at 9a. Specifically, the Fifth Circuit agreed with the District Court that All Saints had established a legitimate, nondiscriminatory reason for McNeil's decision, and that Houston failed to demonstrate that this reason was a pretext for discrimination. *Id.* at 10a. Houston apparently argues that this decision was in error for two reasons: first, she asserts that summary judgment is an inappropriate vehicle for resolving sex discrimination cases under Title VII; and second, she contends that she had

raised a genuine issue of material fact concerning race discrimination. Neither of these arguments has any merit.

A. Summary Judgment is a Proper Procedural Vehicle for Dismissing Title VII Claims When a Plaintiff Fails to Raise a Genuine Issue of Material Fact Supporting Her Claims.

Houston argues that the Fifth Circuit decision herein conflicts with several of this Court's previous decisions[23] by inappropriately applying Fed. R. Civ. P. 56 to a Title VII discrimination case. Although it is difficult to discern precisely Houston's rationale for this argument, it appears to have three components. First, Houston argues that the Fifth Circuit improperly "held that Petitioner, the non-movant, had the burden to prove that there were genuine issues of material fact." Petition at 16. Second, she contends that "the court of appeals erroneously applied the burden of proof rule of *McDonnell Douglas Corp. v. Green* to a summary judgment proceeding depriving Houston of her right to demonstrate to a jury that the hospital's reason for disparate treatment is a pretext." *Id.* at 17 (citation omitted). Third, Houston states, with *no* supporting authority, that "[e]mployment discrimination cases involve subjective questions of motivation and intent which can only be proven by circumstantial evidence. It is arguable that summary judgment is a questionable procedure in such cases" as it operates to denigrate the role of the jury. *Id.* at 18. The Court need look no further than the language of the cases cited by

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[23] The cases cited by Houston are *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973); and *Adickes v. H.S. Kress and Co.*, 398 U.S. 144, 90 S. Ct. 1598 (1969). Significantly, Houston does not quote a *single word* from any of these decisions to support her arguments.

Houston herself to conclude that her arguments are entirely lacking in support.

1. The Fifth Circuit properly applied *Celotex* in allocating the burden of proof on summary judgment motions.

Plaintiff mischaracterizes this Court's ruling in *Celotex* and argues that the Fifth Circuit, in resolving All Saints' and McNeil's Motion for Partial Summary Judgment, improperly placed the burden of proof on Houston, the nonmoving party. Houston's tortured reading of *Celotex*, however, is unconvincing. There, this Court ruled that a movant for summary judgment only has the "initial responsibility of informing the district court of the basis for its motion" and identifying those portions of the pleadings, affidavits, etc., "which it believes demonstrate the absence of a genuine issue of material fact." 477 U.S. at 323, 106 S. Ct. at 2553. The Court continued:

> [W]e find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim.

Id. (emphasis in original). This led to the Court's holding, alluded to by Houston, that "the burden on the moving party may be discharged by . . . pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325, 106 S. Ct. at 2554.

Thus, the central holding of *Celotex* was a *rejection* of the Court's previous holding in *Adickes* that the burden of proof is on the movant to *prove* "the absence of any genuine issues of material fact." *Id.* at 322, 106 S. Ct. 2552 (citing *Adickes*, 398 U.S. at 159, 90 S. Ct. at 1609). Instead, the Court ruled that once the movant had "shown" or "pointed out," even without supporting affidavits, the

absence of a genuine issue of fact, the burden rests squarely on the non-movant:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 322, 106 S. Ct. 2552. Thus, once All Saints and McNeil pointed out, through their Motion for Partial Summary Judgment, the absence of a genuine issue of material fact, the burden was on Houston to establish that such an issue existed for each essential element of her case. As demonstrated *supra*, with respect to issues of harassment, and *infra*, with respect to issues of discrimination, Houston failed to meet this burden, and summary judgment appropriately was entered against her.

2. *McDonnell Douglas* applies to summary judgment proceedings, and summary judgment is appropriate in employment discrimination cases.

Houston's argument that this Court's seminal decision in *McDonnell Douglas* does not apply to summary judgment proceedings is not supported by any case authority, and none is cited by Houston. Indeed, *every* Circuit Court of Appeals has applied *McDonnell Douglas* in the summary judgment context.[24] Thus, certiorari on this issue is unnecessary.

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[24] *See, e.g., LeBlanc v. Great American Ins. Co.*, 6 F.3d 836 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 1398 (1994); *LaFond v. General Physics Servs. Corp.*, 50 F.3d 165, 172 (2d Cir. 1995); *Jackson v. University of Pittsburgh*, 826 F.2d 230, 233-34 (3d Cir. 1987), *cert. denied*, 484 U.S. 1020 (1988); *Tuck v. Henkel Corp.*, 973 F.2d 371, 375 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1276 (1993); *Moore v. Eli*

3. The summary judgment granted herein did not usurp the role of the jury.

In a similar vein, Houston offers *no* supporting authority for her conclusion that "it is arguable that summary judgment is a questionable procedure" in employment discrimination cases. This argument is completely contrary to the policy set forth in *Celotex*. There, the Court observed:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy, and inexpensive determination of *every* action."

Celotex, 477 U.S. at 327, 106 S. Ct. at 2555 (quoting Fed. R. Civ. P. 1). Thus, Title VII cases should be subject to the same analysis as any other federal court lawsuit: when a party fails to raise a genuine issue of material fact, summary judgment should be entered against him.

In a related argument, Houston suggests that the district courts are running amok and "using Rule 56 . . . as authority for a 'trial on affidavits.' " Petition at

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Lilly & Co., 990 F.2d 812, 817 n.24 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 467 (1993); *Canitia v. Yellow Freight Sys.*, 903 F.2d 1064, 1066 (6th Cir. 1990), *cert. denied*, 498 U.S. 984 (1990); *Cherry v. American Tel. & Tel. Co.* 47 F.3d 225, 229 (7th Cir. 1995); *Rinehart v. City of Independence*, 35 F.3d 1263, 1264 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1822 (1995); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 733 (1995); *Martin v. Nannie & Newborns*, 3 F.3d 1410, 1417 (10th Cir. 1993); *Edwards v. Wallace Community College*, 49 F.3d 1517, 1520-21 (11th Cir. 1995); *Jones v. Firestone Tire & Rubber Co.*, 977 F.2d 527, 536 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 2932 (1993); *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *petition for cert. filed*, 64 USLW 3068 (1995).

22. According to Houston, the granting of summary judgment, particularly in employment discrimination cases, tends to "denigrate the role of the jury." *Id.* at 18. Houston's hyperbole fails for two reasons. First, the argument does not go to the question of whether, in the *instant* case, summary judgment was appropriate. Second, Houston's argument previously has been considered and rejected by this Court. The *Celotex* Court continued:

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses *that are adequately based in fact* to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

477 U.S. at 327, 106 S. Ct. at 2555 (emphasis added). Thus, Houston cannot evade her burden of demonstrating a genuine issue of material fact merely by postulating that Rule 56 is a bad idea.

B. Summary Judgment Was Appropriate Herein Because Houston Failed to Raise a Genuine Issue of Material Fact to Support Her Claim of Discrimination

Without citing to or quoting a single word from the summary judgment record, Houston asserts that McNeil's request that Houston push occupied stretchers was "an act of overt discrimination" and that "the discrimination was patently obvious in purpose or effect." Petition at 17, 19. Unfortunately for Houston, as the Fifth Circuit concluded, "Houston did not produce *any evidence*, showing that McNeil's motivation for ordering Houston to push

the stretchers was discriminatory." Petition's Appendix at 10a (emphasis added).[25]

Houston's assertion that pushing stretchers was not a part of the job duties of a nurse grossly misstates the evidence before the trial court, and in fact contradicts her own sworn testimony. Houston admits in her deposition that patients were transported to the recovery room by the "circulating nurse," nurse anesthetists, or other nurses. (Vol. III at 474:18-22.) Houston further admits that this included *white* nurses. (Vol. III at 475, 478-79.) Also, Houston admits that from the inception of her employment at All Saints, she was required to assist in pushing stretchers. (Vol. III at 476:11-21, 487; Vol. VI at 1264.) Thus, all of the competent summary judgment evidence forecloses Houston's attempts to establish a *prima facie* case of discrimination.

Even if pushing stretchers was not part of Houston's original job duties (which it was), Houston cannot rebut All Saints' legitimate, nondiscriminatory reason for requiring her to perform this duty. As was explained to the courts below, prior to Houston being required to push stretchers, the transportation of patients into the operating rooms generally was handled by orderlies. However, because of the necessity of a sterile environment, orderlies were required to leave patients in the hallway while the orderlies put on head and shoe covers to enter the

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[25] In a feeble attempt to create an issue of fact, Houston asserts, "Petitioner called to the attention of the court in her discovery response [sic] the names of nurses, supervisors, and physicians she *intended* to call as witnesses to Dr. Pearce's behavior." Petition at 16 (emphasis added). The trouble is, Houston never produced this testimony, in affidavit form or otherwise. Houston thus suggests that summary judgment should be denied where the non-movant can point to a list of people who *might* testify on her behalf. Such clearly is not the law.

surgery suite. (Vol. III at 456, 502-03, 509.) This resulted in delays in delivering patients to the operating rooms and, consequently, delays in the starting time of the surgical procedures. Therefore, at the suggestion of the orderlies, McNeil asked that Houston, who worked in the Holding Room and already was dressed in a sanitary manner, retrieve the 7:30 a.m. patients from the orderlies and take them to the operating room herself. This helped ensure that patients were delivered on time for their surgeries. (Vol. III at 456; Vol. V at 1046.) Indeed, Houston has *admitted* that she was asked to push stretchers in order to "speed the process up." (Vol. III at 558-59.)

Houston asserts in her Petition that this reason is a pretext, but points to no proof in the record. Significantly, Houston has admitted that she *does not know* whether All Saints' proffered reason for asking her to perform the task was true. (Vol. III at 559-60.) Thus, Houston has *no* evidence of pretext other than her own subjective belief that the real motivation was discrimination, which is insufficient to meet her burden.[26] *See, e.g., Molnar v. Ebasco Contractors, Inc.*, 986 F.2d 115, 119 (5th Cir. 1993).

V. THE DECISION BELOW DOES NOT CREATE A SPLIT AMONG THE CIRCUITS SUBJECT TO REVIEW WITH RESPECT TO WHETHER AGENTS AND SUPERVISORS ARE INDIVIDUALLY LIABLE UNDER TITLE VII

Houston argues that this case creates a conflict among the Circuits as to whether agents or supervisors are liable under Title VII. However, Houston's argument

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[26] To hold otherwise would be to expose employers to Title VII suits any time an employee was required to perform a task which previously was not delineated on a job description. Such a result would unreasonably handcuff employers and, in the case of hospitals, interfere with the prompt treatment of patients.

is fraught with fundamental flaws. First, the Fifth Circuit did *not* hold that agents and supervisors are not liable under the statute; rather, the court properly held, as explained *supra*, that Dr. Pearce was not All Saints' agent. Nothing in the decision below precludes liability for agents or supervisors when a plaintiff actually can demonstrate that the individual *was* an agent or supervisor.[27]

Second, the Fifth Circuit already *does* permit liability for agents and supervisors under particular circumstances, as Houston herself recognizes. *See* Petition at 21 (citing *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986)). Significantly, *this* is the rule that Houston believes should be followed. *Id.* at 21-22. However, Houston petitions for a writ of certiorari because a decision out of the *Ninth* Circuit takes the opposite view. *Id.* at 21 (citing *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583 (9th Cir. 1993)). Inexplicably, Houston seeks certiorari here to reverse a decision of *another* circuit, and to obtain a ruling that would have no effect upon the disposition of *this* case. Such hardly constitutes an appropriate circumstance for a writ of certiorari.

CONCLUSION

Houston's Petition rests precariously on a series of contrived arguments and fundamental misapplications of the relevant case law. Because the courts below properly ruled that Houston's claims are devoid of any factual support, she seeks certiorari of several issues *not* passed upon by the courts below which neither should nor need be considered herein. The central holding of the lower courts, that All Saints and McNeil took prompt remedial action in response to Houston's complaint of harassment,

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[27] Other than to allege a split among the Circuits, Houston does not brief the issue of Dr. Pearce's liability under Title VII.

is unassailable. Further, there is no evidence of a discriminatory animus in McNeil's decision to require Houston to push occupied stretchers.

Thus, the decision of the Fifth Circuit herein does not present any important, undecided issue of federal law. Moreover, Houston's attempt to create a conflict among the Circuit Courts is a transparent artifice. Therefore, certiorari should be denied.

Respectfully Submitted,

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

PAMELA SUE HOUSTON, Plaintiff,	§	
vs.	§	NO. 4:93-CV-678-A
ALL SAINTS HEALTH CARE, INC., D/B/A ALL SAINTS EPISCOPAL HOSPITAL, ET AL., Defendants.	§	

ORDER

(Filed Sep. 21, 1994)

Came on for consideration the motion of defendant Jenny McNeil ("McNeil") to dismiss the Title VII claims asserted against her by plaintiff, Pamela Sue Houston, in plaintiff's second amended complaint. McNeil brings the motion in both her individual capacity and as surgical supervisor. The court, having considered the motion, plaintiff's response, the record, and applicable authorities, finds that the motion should be granted in part. Plaintiff's claims against McNeil, individually, will be dismissed, as Title VII does not provide for liability against employees in their individual capacities. *Grant v. Lone Star Co.*, 21 F.3d 649 (5th Cir.), *pet. for cert. filed*, 63 U.S.L.W. 3161 (U.S. August 25, 1994) (No. 94-365); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994). Therefore,

The court ORDERS that McNeil's motion to dismiss be, and is hereby, granted in part and plaintiff's claims brought under Title VII against McNeil, individually, be, and are hereby, dismissed.

SIGNED September 21, 1994.

/s/ John McBryde
JOHN McBRYDE
United States District Judge